No. 89-1885

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

THAIS CARRIERE, INDIVIDUALLY AND ON BEHALF OF RICHARD DARCEY CARRIERE, SAMUEL CARRIERE, V, LEANORA PAIGE CARRIERE TOMENY, THAIS MARIE CARRIERE and CLAYTON JOSEPH CARRIERE,

Petitioners,

v.

SEARS, ROEBUCK & COMPANY, SIZELER REALTY COMPANY, SIZELER REAL ESTATE MANAGEMENT COMPANY, INC., CONNECTICUT GENERAL LIFE INSURANCE COMPANY, ON BEHALF OF ITS SEPARATE ACCOUNT R, WILLIAM MCINNIS and ALLSTATE INSURANCE COMPANY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF RESPONDENTS SEARS, ROEBUCK AND CO., WILLIAM McINNIS, AND ALLSTATE INSURANCE COMPANY IN OPPOSITION

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

INTERESTED PARTIES

The following list of parent companies and subsidiaries of respondents Sears, Roebuck and Co. and Allstate Insurance Company is provided pursuant to Supreme Court Rule 29.1:

160951 Canada Inc.
492398 Ontario Limited
AEMC of Wisconsin, Inc.
Allstate Development Corporation
Allstate Enterprises, Inc.
Allstate Enterprises Mortgage Corporation of New Mexico
Allstate Indemnity Company
Allstate Insurance Company
Allstate Insurance Company of Canada
Allstate International Inc.
Allstate Investment Management Company
Allstate Life Insurance Company
Allstate Life Insurance Company of Canada
Allstate Life Insurance Company of New York
Allstate Motor Club, Inc.
Allstate Property and Casualty Insurance Company
Allstate Reinsurance Co. Limited
Allstate Service Stations Limited
Allstate Settlement Corporation
Allstate Texas Lloyd's, Inc.
ARAPA-HO, CO.
Associated Gas Resources, Inc.
Banco de Credito Internacional, S.A.
Berry Referrals, Inc.
Best Buyer Home Protection Serviced by Sears, Inc.
Burkhart-AS 1983 Limited Partnership
Cameron Leasing Corporation
Centennial Valley Business Park Property Owners' Association
Civic Center Leasing Corporation
Clary, Oaksmith-Carlson, Inc.
Climate Diagnostic Systems, Inc.

Coldwell Banker Affiliates of Canada Inc.
Coldwell Banker & Company
Coldwell Banker Escrow Services, Inc.
Coldwell Banker Insurance Agency, Inc.
Coldwell Banker Ira E. Berry, Inc.
Coldwell Banker New Homes, Inc.
Coldwell Banker Real Estate Group, Inc.
Coldwell Banker Real Estate, Inc.
Coldwell Banker Referral Services, Inc.
Coldwell Banker Relocation Management Services, Inc.
Coldwell Banker Residential Affiliates, Inc.
Coldwell Banker Residential Brokerage Company
Coldwell Banker Residential Holding Company
Coldwell Banker Residential Mortgage Services, Inc.
Coldwell Banker Residential Real Estate
Coldwell Banker Residential Real Estate Services of Wisconsin, Inc.
Coldwell Banker Residential Referral Network
Coldwell Banker Residential Referral Network, Inc.
Coldwell Banker Settlement and Title Services, Inc.
Coldwell Banker Settlement and Title Services of Maryland, Inc.
Coldwell Banker Title Services, Inc.
Coldwell Banker Title Services, Inc.
Coldwell Banker Title Services, Inc.
Colony Gas Gathering—A Ltd. Partnership
Columbia Escrow Company, Inc.
Contill Realty Limited
Cook Street Credit Company
Dean Witter Advisers Inc.
Dean Witter Capital Advisers Inc.
Dean Witter Capital Corporation
Dean Witter Capital Markets—International (Asia) Ltd.
Dean Witter Capital Markets—International Ltd.
Dean Witter Capital Markets—International Ltd. (U.K.)

Dean Witter CMO Inc.
Dean Witter Equipment Corporation
Dean Witter Financial Services Group Inc.
Dean Witter Financial Services Inc.
Dean Witter Futures and Currency Management Inc.
Dean Witter Futures Limited
Dean Witter Holding Corporation
Dean Witter Leasing Corporation
Dean Witter Liberty Street Securities Inc.
Dean Witter Medical Equipment Management Corporation
Dean Witter Mortgage Capital Corp.
Dean Witter Mortgage Capital Corp. II
Dean Witter Puerto Rico, Inc.
Dean Witter Realty Credit Corporation
Dean Witter Realty Fifth Income Properties Inc.
Dean Witter Realty Fourth Income Properties Inc.
Dean Witter Realty Growth Properties Inc.
Dean Witter Realty Inc.
Dean Witter Realty Income Appreciation Inc.
Dean Witter Realty Income Associates I Inc.
Dean Witter Realty Income Associates II Inc.
Dean Witter Realty Income Properties I Inc.
Dean Witter Realty Income Properties II Inc.
Dean Witter Realty Income Properties III Inc.
Dean Witter Realty Yield Plus Assignor Inc.
Dean Witter Realty Yield Plus Inc.
Dean Witter Realty Yield Plus II Inc.
Dean Witter Reynolds (Canada) Inc.
Dean Witter Reynolds GmbH
Dean Witter Reynolds (Holdings) Limited
Dean Witter Reynolds (Hong Kong) Limited
Dean Witter Reynolds Inc.
Dean Witter Reynolds Insurance Agency (Indiana) Inc.
Dean Witters Reynolds Insurance Agency (Massachusetts) Inc.

Dean Witter Reynolds Insurance Agency (Ohio) Inc.
Dean Witter Reynolds Insurance Agency (Oklahoma) Inc.
Dean Witter Reynolds Insurance Agency (Texas) Inc.
Dean Witter Reynolds Insurance Services (Arizona) Inc.
Dean Witter Reynolds Insurance Services (Arkansas) Inc.
Dean Witter Reynolds Insurance Services (Illinois) Inc.
Dean Witter Reynolds Insurance Services Inc.
Dean Witter Reynolds Insurance Services (Puerto Rico) Inc.
Dean Witter Reynolds Insurance Services of New Jersey, Inc.
Dean Witter Reynolds Insurance Services (Montana) Inc.
Dean Witter Reynolds Insurance Services (New Hampshire) Inc.
Dean Witter Reynolds Insurance Services (South Dakota) Inc.
Dean Witter Reynolds Insurance Services (Wyoming) Inc.
Dean Witter Reynolds International, Inc.
Dean Witter Reynolds International Incorporated
Dean Witter Reynolds International S.A.
Dean Witter Reynolds (Italy) Inc.
Dean Witter Reynolds (Lausanne) S.A.
Dean Witter Reynolds Limited
Dean Witter Reynolds Partners Inc.
Dean Witter Reynolds (Geneva) S.A.
Dean Witter Reynolds (Lugano) S.A.
Dean Witter Reynolds (S.E.A.) Pte. Ltd.
Dean Witter Reynolds S.p.A.
Dean Witter Reynolds Venture Equities Inc.
Dean Witter Transportation Leasing Corporation

Dean Witter Trust Company
Dean Witter Venture Management Inc.
Delaware Chino Development Corporation
Delaware Seminole County Investment Company
Delaware Westgate Corporation
Demeter Management Corporation
Direct Marketing Center Inc.
Discovery Card Bank of New Castle
Discover Card Services, Inc.
Discover Credit Corp.
Discover Receivables Financing Corporation
DM Management Company
Dur-O-Wal, Inc.
Dur-O-Wal, Ltd.
DW Administrators Inc.
DWCC-Miller Holdings, Inc.
DWR Partnership Administrators Inc.
DWR Special Advisors Inc.
DWR Special Partners Inc.
DWR Wind Technologies Inc.
Enclave Advancement Group, Inc.
Enterprise Services Corporation
Executrans Canada Limited
Executrans, Inc.
Exec-Van Systems, Inc.
Eye Care Centers of America, Inc.
Fallowfield Developers Limited Partnership
First Assurance Company
Fleet Maintenance, Inc.
Forest E. Olson, Inc.
Forty Fifth and Main Redevelopment Corporation
Gateway Property Owners' Association
General Underwriters Agency, Inc.
Greenbrier Mall Venture
Greenwood Trust Company
Grey City Graphics, Inc.
Guardian Title Company
HAFV Corporation

HCC Communications Company
HDXR Associates
HLMA Corporation
HO-CO Springs Co.
HO Austin Development Co.
HO Bell Road Investment Corp.
HO Chandler Investment Inc.
HO Concord Land Co., Inc.
HO East Mesa Investment, Inc.
HO El Segundo, Inc.
HO Frisco Development Co.
HO Glendale Investment Co.
HO Lakeland Mall Investment Co.
HO Lewisville Investment Corp.
Holiday Homes International Corp.
Homart Community Centers, Inc.
Homart Development Co.
Homart Hamden Investment Co.
Homart Manchester Investment Co.
Homart San Antonio Investment Co.
Homart Shavano Investment Co.
HO Meriden Square Development Co.
HOM Investment Corp.
HO Montgomery Development, Co.
HO Nashville Investment Corporation
HO Pembroke Square Mall Investment Co.
HO Peoria Development Co.
HO Simi Valley Development Co.
HO South Ft. Worth Development Co.
HO Spring Hill, Inc.
HO Tampa Development Co.
HO Tysons Office Investment Co.
Hurley State Bank
Kansas City Referral Network, Inc.
Kerrybrooke Development Limited
Kerrytor Limited
Kilroy Co-Investment Partners III, L.P.
Kingsway Imports Ltd.

Lee Leasing Corporation
Lee Estimations Gillos Bordeleau Inc.
Levolor Corporation
Lewiston Leasing Corporation
Liberty Realty Advisors Inc.
Liberty Street Management Inc.
Lincoln Benefit Life Company
LLJV Funding Corporation
Market Credit Corp.
Mason Park Property Owners' Association
Mature Outlook Inc.
Midland Asia Ltd.
Midland (Europe), Ltd.
Midland International Corporation
Midland Overseas, Ltd.
MontorLab Inc.
North Atlanta Venture, Inc.
Northbrook Indemnity Company
Northbrook Investment Management Company
Northbrook Life Insurance Company
Northbrook National Insurance Company
Northbrook Property and Casualty Insurance Company
North Tampa Venture, Inc.
NTW Incorporated
Omni Investors, Inc.
Omnitrue Merging Corp.
One Water Corporation
Pinstripes Petites, Inc.
PMI Insurance Co.
PMI Mortgage Insurance Co.
PMI Securities Co.
Preston Park South Property Owners' Association
Previews Incorporated
Price & Pierce Group Ltd.
Private Brands, Ltd .
Provident Title Company
Quetor Realty Limited

Realty Management Services Inc.
Referral Network, Inc.
Regbrooke Limited
Reynolds Securities Inc.
Ridgewell, Fox and Partners (Underwriting Management Limited)
Sanguine/A Anadarko, Ltd.
Sartell Leasing Corporation
SCFC Receivables Corp.
SCFC Receivables Financing Corporation
Science Center Associates
Scripps Center Associates
Sears (1978) Limited
Sears Acceptance Company Inc.
Sears Buying Services, Inc.
Sears Buying Services (Japan) K.K.
Sears Canada Inc.
Sears Communications Company
Sears Communications Network Canada Inc.
Sears Consumer Discount Company
Sears Consumer Financial Corporation
Sears Consumer Financial Corporation of Delaware
Sears Consumer Financial Corporation of Iowa
Sears Consumer Financial Corporation of Tennessee
Sears Driving School, Inc.
Sears Finance Corporation
Sears Holdings Limited
Sears International Marketing, Inc.
Sears Investment Management Co.
Sears Limited
Sears Mortgage Corporation
Sears Mortgage Funding Corporation
Sears Mortgage Securities Corporation
Sears Overseas Finance N.V.
Sears Payment Systems Inc.
Sears Properties Inc.
Sears Receivables Financing Group, Inc.
Sears, Roebuck Acceptance Corp.

Sears, Roebuck and Co. B.V.
Sears, Roebuck de Espana, S.A.
Sears, Roebuck de Mexico, S.A. de C.V. (Mexico)
Sears, Roebuck de Puerto Rico, Inc.
Sears, Roebuck Limited (England)
Sears, Poebuck Overseas, Inc.
Sears, Roebuck Pty. Limited (Australia)
Sears, Roebuck S.A. (Central America)
Sears Savings Bank
Sears Technology Services, Inc.
Sears Tower Management-Company
Sears World Trade, Inc.
Sears World Trade (Korea) Inc.
Sears World Trade (Taiwan), Inc.
Shell Beach Hotel Corporation
SikaHo Transport, Inc.
St. Laurent Shopping Centre Limited (Canada)
Surety Life Insurance Company
Tech-Cor, Inc.
Tempo-GP, Inc.
Tempo-LP, Inc.
Terminal Freight Handling Co.
Tire America, Inc.
Titan Rubber International, Inc.
Top South Limited
Tower Ventures Inc.
Trans-Coast Services, Inc.
Truswal Company, AB
Truswal Real Estate (California) Inc.
Truswal Real Estate (Colorado), Inc.
Truswal Real Estate (Maryland), Inc.
Truswal Systems Corporation
Truswal Systems of Canada, Ltd.
Truswal Systems, Ltd.
Tysons II Property Owners Association
Valley of California, Inc.
Ventor Realty Limited
WAAS of Port Arthur, Inc.

WASCO Insurance Agency, Inc.
WASCO of Lawrence, Inc.
WASCO of Sedalia, Inc.
Washington Business Park Associates
Western Acceptance Company
Western Acquisition, Inc.
Western Auto Supply Company
Western Auto Supply Company of Ontario Limited
Wilshire Landmark I
Wintor Realty Limited
Wisconsin Referral Network, Inc.
Xerox Centre Associates

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

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OPINION BELOW

The opinion of the Fifth Circuit in this case is reported at 893 F.2d 98.

STATUTES AND RULES

28 U.S.C. § 1332 (1988). Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

28 U.S.C. § 1441 (1988). Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

28 U.S.C. § 1447 (1988). Procedure after removal generally

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

* * * *

(c) If at any time before final judgment it appears that the case was removed improvidently and without

jurisdiction, the district court shall remand the case, and may order the payment of just costs. A certified copy of the order of remand shall be mailed by its clerk to the clerk of the State court. The State court may thereupon proceed with such case.

Fed. R. Civ. P. 56. Summary Judgment

* * * *

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. . . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . . .

* * * *

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for

trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Rule 81. Applicability in General

* * * *

(c) Removed Actions. These rules apply to civil actions removed to the United States district courts from the state courts and govern procedure after removal. * * *

La. Rev. Stat. 23:1032.

Exclusiveness of rights and remedies; employer's liability to prosecution under other laws

The rights and remedies herein granted to an employee or his dependent on account of an injury, or compensable sickness or disease for which he is entitled to compensation under this Chapter, shall be exclusive of all other rights and remedies of such employee, his personal repre-

sentatives, dependents, or relations, against his employer, or any principal or any officer, director, stockholder, partner or employee of such employer or principal, for said injury, or compensable sickness or disease.

STATEMENT OF THE CASE

Sam Carriere was employed by Sears, Roebuck and Co. as security manager of its retail store in Lake Forest Plaza Shopping Center in New Orleans, Louisiana. The store's security system included a number of surveillance cameras that fed pictures to monitors installed in one of the security offices. Mr. Carriere was watching those monitors late in the afternoon of February 2, 1987, when he noticed something suspicious on the feed from the loading dock. He turned on the video recorder and left the office.

William McInnis, a full-time police officer with the New Orleans Police Department working for Sears part-time as a security assistant, was taking a car theft report from two customers in the adjacent office. Mr. Carriere, in leaving, did not tell Officer McInnis where he was going and did not ask for assistance. But within minutes Mr. Carriere radioed Officer McInnis from the loading dock with an urgent call for back-up. Officer McInnis immediately ran to the loading dock, only to find that Mr. Carriere had been fatally shot. The identity of Mr. Carriere's murderer has never been ascertained.

Plaintiffs are Mr. Carriere's widow and children. They filed this wrongful death/survival action under Louisiana state law in the Civil District Court for the Parish of Orleans, State of Louisiana, on January 28, 1988.

They joined as defendants Officer McInnis and Allstate Insurance Company, alleged to have been his insurer; Sears itself, employer of both Carriere and McInnis and owner of the store and the loading dock and of the parking lot that surrounded them both; Connecticut General

Life Insurance Company, owner of the rental space in the shopping center and of parking areas ancillary to it; and Sizeler Realty Company, alleged to be Connecticut General's on-site manager. Plaintiffs were all Louisiana residents, as were defendants McInnis and Sizeler Realty. The remaining defendants were all incorporated outside of Louisiana and had their respective principal offices outside of Louisiana.

The diverse defendants timely removed the case to the United States District Court for the Eastern District of Louisiana on March 7, 1988. The district court's jurisdiction was premised on diversity of citizenship, it being defendants' contention that McInnis and Sizeler Realty had been fraudulently joined. Plaintiffs filed their motion to remand within about two weeks, on March 23, 1988, and noticed the motion for hearing on April 21. On April 12 and 13, Sizeler Realty, Connecticut General, Sears and Allstate filed their oppositions to the remand motion and supporting affidavits.[1] On April 18, 1988, plaintiffs moved to continue the hearing of their motion to remand on grounds that the issues raised by defendants in their oppositions had transformed it into something "in the nature of a motion for summary judgment" and that they needed more time to prepare.

On April 26, 1988, plaintiffs sought and obtained leave to amend to join Sizeler Real Estate Management Company, as an additional defendant. The amendment was prompted by an affidavit filed in support of Connecticut General and Sizeler Realty's opposition to the motion to remand that explained that Sizeler Realty had been replaced by Sizeler Management as Connecticut General's on-site manager at Lake Forest on January 7, 1987, five weeks or so *before* Mr. Carriere was shot.[2] The joinder

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[1] Officer McInnis had not been served by this point and did not make an appearance.

[2] It is, from all appearances, uncontroverted by plaintiffs that Sizeler Management, not Sizeler Realty, was, in fact, Connecticut

of Sizeler Management clearly altered the procedural posture of the case and prompted Sizeler Realty and Connecticut General to move for a second continuance of the hearing, so that it might be joined with the hearing of their anticipated summary judgment motions. All parties consented to the motion and the hearing was reset for July 13, 1988.

On May 25 and 27, Sizeler Realty, Sizeler Management, and Sears filed motions for summary judgment, relying in part on the affidavits filed earlier in opposition to the remand motion and in part on new affidavits. More than a month later, on July 6 and 8, plaintiffs filed their opposition to the summary judgment motions and a supplemental memorandum in support of their motion to remand. Plaintiffs filed five affidavits in support of the new papers.

In preparing for the July 13 hearing, Sears learned of serious defects in plaintiffs' affidavits. It filed a motion to strike them on the morning of the hearing, on grounds that they were unsworn, that certain of them had been altered, that they were not on the affiants' personal knowledge, and that they had been submitted in bad faith.

The substantive motions depended on showings that Officer McInnis and Sears enjoyed immunity from suit in tort under Louisiana's Workers' Compensation Act, absent supportable allegations that they had committed intentional torts that contributed to Mr. Carriere's death and that Sizeler Realty/Management had assumed no actionable responsibility for security on Sears' premises.

General's manager on February 2, 1987. Plaintiffs did not, however, drop Sizeler Realty as a defendant when they added Sizeler Management. Their approach to the issue in this Court, as it was in the Fifth Circuit, is to refer to the two concerns jointly as the "Sizeler Interests" and to imply that they sued both concerns in state court. They didn't. *See* Petition for Certiorari at 3 and *passim*.

By minute entry dated July 15, 1988, the district court granted both the motion to strike the affidavits and the defendants' summary judgment motions. Misperceiving that plaintiffs had joined a claim for death benefits under Louisiana's Workers' Compensation Act[3] to their wrongful death claim, the court also attempted to remand the claim for compensation benefits to the state court. The order was clarified and amended by minute entry of August 29, 1988, to deny the remand motion outright.

Allstate was dismissed by order of November 1, 1988, on a summary judgment motion supported by affidavits showing that Allstate had no insurance in effect covering Officer McInnis.[4] Officer McInnis, having been finally served with process on October 10, 1988, was dismissed on November 1 as well, pursuant to Fed. R. Civ. P. 4(j).

The final dismissal was handed down on January 11, 1989, on Connecticut General's motion for summary judgment.

Plaintiffs had served state-court interrogatories and requests for production on Sears on February 26, 1988. Sears served its responses on April 13, 1988, its time for responding having been enlarged by the court on motion. Plaintiffs made no other efforts at discovery through the hearing on the remand and summary judgment motions in July. They did notice and take depositions in November 1988 in connection with the summary judgment motion filed by Connecticut General, then the sole remaining defendant. The transcripts of those depositions were considered by the court in ruling on Connecticut General's motion and were found by it not to raise a genuine issue of material fact.

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[3] Plaintiffs have never complained that they are not, in fact, receiving appropriate benefits under the Act.

[4] Allstate was sued under Louisiana's direct action statute, La. R.S. 22:655.

In view of this Court's Rule 15.1, Sears, Allstate, and Officer McInnis note the following discrepancies between the plaintiffs' recitation of facts and an accurate one:

1) Plaintiffs brought suit on January 28, 1988, not February 3, 1988.[5]

2) Defendants raised the issue of fraudulent joinder explicitly in their removal petition, served on plaintiffs through counsel on or about March 7, 1988, fully four months—not six weeks—before the July 13 hearing on the remand and summary judgment motions.[6]

3) Plaintiffs' motion to continue the July 13 hearing was not supported by an affidavit of counsel "setting forth the need for specific discovery"; counsel's affidavit suggested only that depositions that he had neglected to schedule in the prior four months might produce some unspecified advantage to his clients' case.[7]

4) Plaintiffs' counsel had been informed of the grounds of Sears' objection to his use of the defective affidavits and of its intention to move to strike them by phone on July 8, 1988, within 48 hours of their having been served on Sears by counsel, and five days before the hearing.[8]

5) It was 349 days—not 169 days—from the initiation to final disposition, under Fed. R. Civ. P. 54(b), of plaintiffs' case in the district court[9]; the earlier dismissals were, of course, interlocutory and could have been reconsidered in the trial court until January 11, 1989.[10]

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[5] *See* Petition for Certiorari at 3.

[6] *See id.* at 4.

[7] *See id.* at 4.

[8] *Contrast id.*

[9] *See id.* at 6.

[10] *See* Balla v. Idaho State Board of Corrections, 869 F.2d 461, 465 (9th Cir. 1989), *citing* Marconi Wireless Telegraph Co. v. United States, 320 U.S. 1, 47-48, 63 S. Ct. 1393, 1414-15, 87 L. Ed. 2d 1731 (1943).

SUMMARY OF THE ARGUMENT

I.

The district court appropriately pierced plaintiffs' pleadings in determining that the nondiverse defendants had been fraudulently joined. There was no genuine contest over Officer McInnis' immunity from suit in tort under the Louisiana Worker's Compensation Act and no showing of a basis from which to conclude that the shopping center manager was responsible for security on Sears' premises.

II.

Connecticut General, owner of the leased space in the shopping center, had no obligation, by contract or in practice, to provide for the security of Sears' premises. Sears did not injure Mr. Carriere intentionally and so remained immune from suit in tort. Allstate did not insure Officer McInnis. Summary judgment dismissing Connecticut, Sears, and Allstate were properly granted.

III.

A. A summary judgment-like procedure is appropriate for reviewing matters of substantive fact on a claim of fraudulent joinder. Absent a showing of good cause and of diligence in pursuing discovery, plaintiffs were not entitled to a third continuance of the hearing on their motion to remand.

B. Plaintiffs could not have waived an objection to the district court's diversity jurisdiction. They could not, therefore, have been impeded in their discovery efforts by a reasonable fear of waiver.

C. The values of economy, convenience, fairness and comity were served by the prompt and efficient resolution of this controversy under applicable Louisiana law.

D. The Fanguy affidavit created no genuine issue about Officer McInnis' exposure, and Louisiana law does

not impose upon a land owner a duty to see to the security of persons on neighboring property.

ARGUMENT

I. REMAND WAS PROPERLY DENIED IN THAT THE NONDIVERSE DEFENDANTS WERE FRAUDULENTLY JOINED.

An allegation of fraudulent joinder does not challenge the plaintiffs' subjective motive in joining a nondiverse defendant but rather tests the *possibility* that a state court, applying its own laws, would find the nondiverse defendant or defendants liable on the claim asserted. *B., Inc. v. Miller Brewing Co.*, 663 F.2d 545, 549 (5th Cir. 1981); *Tedder v. F.M.C. Corp.*, 590 F.2d 115, 117 (5th Cir. 1979). Where there is no such possibility, the citizenship of the nondiverse defendant is disregarded for purposes of determining federal jurisdiction. *See American Dredging Co. v. Atlantic Sea Con. Ltd.*, 637 F. Supp. 179 (D.N.J. 1986); *Lewis v. TIME, Inc.*, 83 F.R.D. 455 (E.D. Cal. 1979).[11]

The burden of persuasion is on the party asserting fraudulent joinder. That burden is not, however, to show that the plaintiff has failed to state a claim against the nondiverse defendant, but rather only to show that "there is *no possibility* that the plaintiff would be able to establish a cause of action against the instate defendant in state court. . . ." *B., Inc., supra*, 663 F.2d at 549, citing *Keating v. Shell Chemical Co.*, 610 F.2d 328, 331 (5th Cir 1980); *Tedder, supra*; *Bobby Jones Garden Apts. v. Suleski*, 391 F.2d 172, 177 (5th Cir. 1968); *and Parks v. New York Times Co.*, 308 F.2d 474, 478 (5th Cir.

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[11] There may, of course, also be questions of subjective fraud on a plaintiff's part and of error, whether intentional or not, in a plaintiff's allegations bearing directly on citizenship, but this case doesn't turn on them. *See generally*, B., Inc., *supra*, 663 F.2d at 545.

1962), *cert. denied*, 376 U.S. 949, 84 S. Ct. 964, 11 L. Ed. 2d 969 (1964). To determine whether the plaintiff could establish a claim against the nondiverse defendant, the district court is to consider the *uncontested* substantive facts—as they are made to appear in the affidavits, deposition transcripts, and other similar material received by the court—and to resolve all *contested* matters in favor of the plaintiff. *B., Inc., supra*, 663 F.2d at 549. The procedure is similar to that employed on a mation for summary judgment. *B., Inc., supra*, 663 F.2d at 549 n.9, *citing Keating, supra*, 610 F.2d at 333. A district court must have such a procedure available to it if its removal jurisdiction is not to be eviscerated by clever but factually insupportable pleading.

The pleadings and affidavits submitted in this case on the remand motion established, without contest, that Mr. Carriere was in the course of his employment with Sears when he was killed; that Officer McInnis was a co-employee; and that Officer McInnis had no hand in Mr. Carriere's murder, did not intend that it take place, and was not substantially certain that it would take place. On those facts, the applicable law relegates Mr. Carriere's survivors to an action for death benefits under Louisiana's Workers' Compensation Act. La. R.S. 23:1032 (co-employees mutually immune in tort for workplace accidents except in case of "intentional act"); *Fallo v. Tuboscope Inspection*, 444 So. 2d 621, 622 (La. 1984); *Bazley v. Tortorich*, 397 So. 2d 475, 481 (La. 1981) (intent explained as conscious desire that the physical result of an act ensue or a substantial certainty that it will ensue); *Kent v. Joma Products, Inc.*, 542 So. 2d 99, 100-01 (La. App. 1st Cir. 1989); *Davis v. Southern Louisiana Insulations*, 539 So. 2d 922, 924 (La. App. 4th Cir. 1989); *Walker v. Grantham*, 449 So. 2d 12 (La. App. 1st Cir. 1984); *Maddie v. Plastic Supply & Fabrication, Inc.*, 434 So. 2d 158 (La. App. 5th Cir. 1983), *writ denied*, 435 So. 2d 445 (La. 1983) (even gross negligence insufficient to permit imputation of intent);

Reagan v. Olinkraft, Inc., 408 So. 2d 937, 940 (La. App. 2d Cir. 1981), *writ denied*, 421 So. 2d 1095 (La. 1982) ("substantially certain" explained as "virtually sure" or "nearly inevitable").[12] There was, therefore, no possibility of a claim against Officer McInnis.

Sizeler Realty's joinder as an original defendant in state court was obviously a mistake on plaintiffs' part. The uncontroverted evidence presented to the court showed that it had been replaced as Connecticut General's on-site manager at Lake Forest some five weeks before Mr. Carriere was shot and that Sizeler Management had taken over its responsibilities. Sizeler Realty wasn't there, had no duty to be there, and didn't even have an opportunity to commit a wrong actionable by Mr. Carriere's survivors.

Sizeler Management was added as a defendant after removal on plaintiffs' application for leave to amend, obtained without Sears or Allstate's consent. The claim against it was for negligent provision of security services at the Lake Forest center. But the uncontested substantive facts were that Sears owned its land and building and provided its own security; that the incident in which Mr. Carriere was shot took place entirely on Sears' premises; and that Sizeler Management had neither the responsibility nor the authority to patrol or secure the Sears store, loading dock, or parking lot. Louisiana imposes upon its citizens no duty to protect others against the criminal acts of third persons, even foreseeable crim-

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[12] Louisiana courts have endorsed summary judgment procedures for traversing general allegations that a defendant has lost his immunity from suit in tort by commission of an intentional act that injures an employee. Simoneaux v. E.I. duPont de Nemours & Co., 483 So. 2d 908 (La. 1986); Fallo v. Tuboscope Inspection, *supra*; *and see* Mayer v. Valentine Sugars, Inc., 444 So. 2d 618 (La. 1984) (recommending the defendant file a motion for summary judgment on the intentional act issue on remand despite confirmation that plaintiff's general allegations of intent were sufficient to defeat defendant's pleading-bound exception of no cause of action).

inal acts, except where the parties are in a special relationship. *Harris v. Pizza Hut of Louisiana, Inc.*, 455 So. 2d 1364, 1371 (La. 1984). Innkeepers and their guests have such a relationship. *Banks v. Hyatt*, 722 F.2d 214 (5th Cir. 1984). So do business owners and those foreseeably attracted to their business premises. *Harris, supra*, 455 So. 2d at 1369. There is no such special relationship between a business owner and a security officer hired to protect neighboring premises. It follows that plaintiffs would not have been able to establish their claim against Sizeler Management.

Plaintiffs' motion to remand was, therefore, properly denied.

II. THE SUMMARY JUDGMENTS WERE PROPERLY GRANTED.

The summary dismissal of plaintiffs' claims against Connecticut General follows from the determination that Sizeler Management, which operated that portion of the Lake Forest center that Connecticut General owned, was fraudulently joined. For it, as well, had no such relationship with Sears or anyone else, by contract or in practice, that would have obliged it to provide or see to the provision of security on Sears' premises. Depositions taken in November 1988 had shed no adverse light on the defense.

Allstate's dismissal was entered on affidavits of Allstate's regional manager and Officer McInnis, its supposed insured, showing that it had not, in fact, issued a policy covering Officer McInnis.

Sears' summary dismissal was on grounds that it, like Officer McInnis, enjoyed immunity from suit in tort absent an intentional act. Plaintiffs' allegations against it were broader than those made against Officer McInnis but equally insubstantial. Sears submitted affidavits in support of its motion denying a corporate intent that Mr. Carriere be killed, abjuring knowledge of involvement

in the murder by any of its employees, detailing Mr. Carriere's training for his job as security manager, and explaining that its policy against the carrying of handguns by its civilian security personnel had been adopted in the interests of employee and customer safety.

Plaintiffs failed to controvert the affidavits or to explain adequately why they needed more time to do so. They admitted, instead, in a district court brief, that their case against Sears depended on a suspicion that Sears knew, probabilistically, that its policies would result in a death or serious injury, sometime, someplace, rather than on a contention that it had a specific understanding that Mr. Carriere would be wounded or killed. Probabilistic knowledge, even where established, will not support a finding of an intentional act. *Maddie v. Plastic Supply & Fabrication, supra,* 434 So. 2d at 161.

A summary judgment in Sears' favor was, therefore, rendered as required by Fed. R. Civ. P. 56(c). *See Celotex Corp. v. Catrett,* 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.,* 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d. 538 (1986) (summary judgment granted where nonmovant fails to adduce "sufficient facts showing that there is a genuine issue for trial").[13]

III. PLAINTIFFS PRESENT NO SERIOUS QUESTIONS FOR REVIEW.

A. The first of plaintiffs' four arguments for issuance of the writ is in two parts, both confused. The first is that the Fifth Circuit was untrue to its own controlling precedent in approving the district court's piercing of the

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[13] Officer McInnis' dismissal was, in light of the determination that he had been fraudulently joined, probably unnecessary. It was, however, clearly authorized by Fed. R. Civ. P. 4(j), in view of plaintiffs' unexplained delay in serving him.

pleadings on substantive, as opposed to jurisdictional, facts. The second is that plaintiffs were not given an adequate opportunity to develop the substantive factual issues.

The first part of the argument isn't good history. The Fifth Circuit's prior decisions make it clear that a full scale "evidentiary hearing would indeed be appropriate" in case of alleged misrepresentations of jurisdictional matters, such as the corporate existence of a named defendant or the true domicile of the parties. *B., Inc., supra*, 663 F.2d at 551 n.14. But those decisions also explicitly authorize a summary judgment-like review of substantive matters to resolve a claim of fraudulent joinder. *Id.*, 663 F.2d at 549 n.9, *citing Keating, supra*, 610 F.2d at 333.

The issue in *Keating* was, as one of the issues is here, whether a plaintiff injured on the job had stated a colorable claim under Louisiana law against a co-employee. The Fifth Circuit sustained the district court's finding that plaintiff had failed to allege an intentional act, but it remanded the case to the district court for consideration of the alternative allegations that the defendant co-employee was not in the course and scope of his employment at the time of the accident and, therefore, that he was not entitled to tort immunity under La. R.S. 23:1032, irrespective of intent. The Fifth Circuit directed that the course-and-scope issue be determined "[b]y summary judgment or otherwise" but short of "a full dress trial on the merits." 610 F.2d at 331-33.

It could not be clearer that the procedure employed and approved in this case is of legitimate and long-standing Fifth Circuit pedigree.

The second part of plaintiffs' first argument is not that the Fifth Circuit procedure is flawed in concept, but rather that it puts plaintiffs to their proof too early. But Rule 11 and its state cognates, like La. Code Civ. P.

art. 863, warn parties and their attorneys to make their factual and legal inquiries before filing. And Fed. R. Civ. P. 56(f), by analogy, safeguards against a premature jurisdictional call, provided only that the plaintiff has been diligent in pursuing discovery, presents specific facts to explain his inability to support his position, and demonstrates specifically "how postponement of a ruling on the motion will enable him, by discovery or other means, to rebut the movant's showing of the absence of a genuine issue of fact." *Willmar Poultry Co. v. Morton-Norwich Products, Inc.*, 520 F.2d 289, 297 (8th Cir. 1975), *cert. denied*, 424 U.S. 915, 96 S. Ct. 1116, 47 L. Ed. 2d. 320 (1976), *cited in Securities & Exchange Comm'n v. Spence & Green Chem. Co.*, 612 F.2d 896, 901 (5th Cir. 1980); *and see Fontenot v. Upjohn*, 780 F.2d 1190, 1193 (5th Cir. 1983).

In this case, plaintiffs did no discovery during the period of over four months between removal and denial of the motion to remand. Counsel's affidavit utterly failed to identify specific hopes for further discovery. Indeed, the discovery done by plaintiffs during the four months after denial of the remand motion was insufficient to create a genuine issue with respect to a diverse defendant, Connecticut General, or to impugn the dismissals and other rulings already rendered. Orders denying motions to continue hearings are reviewed on an abuse-of-discretion standard. *Fontenot v. Upjohn, supra*, 780 F.2d at 1193. There is nothing in plaintiffs' application to raise even a suspicion that the district court here abused its discretion in actually hearing and deciding plaintiffs' motion to remand on its third setting.

B. Plaintiff's second argument for issuance of the writ is founded on a simple misunderstanding of the jurisprudence on waiver of removal defects. A reading of one of plaintiffs' own authorities, *McKay v. Boyd Construction Co., Inc.*, 769 F.2d 1084 (5th Cir. 1985), is sufficient to dispel the confusion and explode the argument.

In *McKay*, a Wisconsin resident sued a Mississippi corporation and the Mississippi State Highway Department in a Mississippi state court. The corporate defendant removed. The federal district court granted it a summary judgment and dismissed the Highway Department. The Fifth Circuit, on appeal, vacated, remanded, and directed that the district court remand to the state court in view of the 11th Amendment's bar to its exercise of jurisdiction over an agency of the state. 769 F.2d at 1086. The court noted that the Highway Department had not waived, by failing to raise, the 11th Amendment objection, precisely because it was jurisdictional. *Id.* The court also commented that while the removal was technically infirm in that the removing defendant was a citizen of the forum state, the technical infirmity was waived when plaintiff failed to object to it. 769 F.2d at 1087. Thus, as *McKay* illustrates, technical defects in removal procedure are waivable, but issues that go to the heart of federal jurisdiction may be raised at any time, either by the parties or by the court.

Not one of plaintiffs' authorities suggests anything to the contrary.[14] Indeed, this Court has clearly stated that parties may not confer subject matter jurisdiction on a removal court by consent or waiver. *American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 71 S. Ct. 534, 95 L. Ed. 702 (1951).

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[14] *See* Harris v. Edward Hyman Co., 664 F.2d 943 (5th Cir. 1981) (failure of served defendant to join in removal petition waivable); Fristoe v. Reynolds Metals Co., 615 F.2d 1209 (9th Cir. 1980) (late filing of removal petition waivable); Johnson v. Odeco Oil and Gas Company, 679 F. Supp. 604 (E.D. La. 1987) (prohibition against removal of Jones Act claim waivable); Commercial Associates v. Tilcon Gammino, Inc., 670 F. Supp. 461 (D.R.I. 1987) (similar to McKay); Roberts v. Vulcan Material Company, 558 F. Supp. 108 (M.D .La. 1983) (follows Harris); *see also* Hartford Acc. & Indem. Co. v. Costa Lines Cargo Services, Inc., Nos. 89-3020 and 89-3273, slip op. (5th Cir. May 31, 1990).

Since complete diversity is jurisdictional, plaintiffs could not have waived, by delay in asserting them[15] or participation in collateral pre-trial proceedings, the objections to removal that they in fact did make. It follows that they were not impeded in their discovery efforts by reasonable fear of waiver of their remand objections and, consequently, that their failure to do any useful discovery before the remand and summary judgment motions were heard and decided remains unexplained.

C. Plaintiffs' third argument for issuance of the writ depends on a misreading of this Court's recent decision in *Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 108 S. Ct. 614, 98 L. Ed. 2d 720 (1988). Generously construed, the argument is plaintiffs' old one that court policy requires remand wherever a plaintiff's allegations, uncritically accepted, state a claim for relief against a nondiverse defendant that can withstand a motion to dismiss under Fed. R. Civ. P. 12(b)(6).[16]

Cohill didn't have the opportunity to support that argument. The issue there was whether a federal district court, in a properly removed case, had the discretionary authority to remand, rather than dismiss, state claims over which it had had pendent jurisdiction when the federal-law claims on which jurisdiction was based were eliminated by the plaintiff's post-removal voluntary dis-

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[15] Plaintiffs' reliance on 28 U.S.C. § 1447(c) (1988), is seriously misplaced. The amendment to § 1447(c) was adopted in 1988 and took effect in May 1989, months *after* entry of final judgment against plaintiffs in this case. Even in newer cases, it calls for prompt filing—within 30 days of removal—of such remand motions only as depend on a "defect in removal procedure." It does not suggest that jurisdictional defects, such as lack of complete diversity, can be cured by a tardy objection.

[16] It is an unstated premise of plaintiffs' argument that the hypothetical motion will be heard on the face of the papers, without the admission of factual matter that would require the district court to handle it as a motion for summary judgment under Rule 56.

missal of them. The Court held that a district court has just that discretion, to be exercised by it with a view toward promoting "the values of economy, convenience, fairness, and comity." 484 U.S. at 353, 357, 108 S. Ct. at ——, 98 L. Ed. 2d at 731, 734.

Cohill, therefore, has no application to this case, except perhaps to the extent that it reminds litigants and judges of the interest that they all have "in the prompt and efficient resolution of controversies based on state law." 484 U.S. at 353, 108 S. Ct. at 620, 98 L. Ed. 2d at 731.[17] It is, of course, the prompt and efficient disposition of this claim that plaintiffs most complain about.

D. Plaintiffs' last argument for issuance of the writ is to the effect that the court misconstrued and misapplied Louisiana law in confirming Officer McInnis' fraudulent joinder and dismissing Sizeler Management. These defendants have already addressed the substance of the argument.[18] It remains only to deal with the Fanguy affidavit and with plaintiffs' emphatic reliance on the decision in *Willie v. American Cas. Co.*, 547 So. 2d 1075 (La. App. 1st Cir. 1989).

Addie Fanguy was, like Officer McInnis, a New Orleans policeman. He participated in the investigation of Mr. Carriere's murder. Plaintiffs rely on his affidavit about the statements Officer McInnis made immediately after the murder to attempt to raise a genuine issue of material fact about Officer McInnis' exposure.

Officer Fanguy's affidavit was, first of all, suspect. Officer Fanguy signed it on June 27, 1988, but it was not produced to the defendants until July 5, 1988. Sears immediately noticed his deposition and attempted to serve

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[17] A defendant's interest in the federal forum after removal is, of course, a legitimate interest worthy of protection itself. *See* Hensgens v. Deere & Co., 833 F.2d 1179 (5th Cir. 1987).

[18] See text at 12-14, *supra*.

him with a subpoena for it, in order to test the averments made in the affidavit, but Officer Fanguy avoided service. The police department itself, after service of a deposition subpoena duces tecum on it and considerable negotiation with the city attorneys, produced what was represented to be that part of the Carriere murder investigation that pertained to Officer McInnis, but it did so only on July 12, 1988, the day before the hearing on the remand motion. Counsel's examination of the record extract showed it to be entirely consistent with Officer McInnis' original affidavit.[19] The district court struck Officer Fanguy's affidavit, along with all of the rest of the affidavits plaintiffs submitted.

But even if Officer Fanguy's affidavit is to be considered, there is still no genuine issue of material fact. Plaintiffs' argument that there is turns solely on the affidavit's having recited that Officer McInnis told Officer Fanguy during the investigation that he "should have" accompanied Carriere to the loading dock, and a legal dictionary definition that read the concept of obligation into the considered use of the term "should" is unpersuasive without the further showing that Officer McInnis had Black's in mind when he said whatever he did say to his brother officer. Indeed, the pertinent usage note in the American Heritage Dictionary of the English Language (1969) explains that "[*s*]*hould*, in indicating obligation or necessity, is somewhat weaker than *ought* and appreciably weaker than *must* and *have to*."

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[19] Plaintiffs' suggestion, at page 15 of their petition, that Fanguy's affidavit, "based upon statements made immediately after the incident," is more credible than McInnis', "submitted long after the fact and in support of summary judgment," is disingenuous at best. McInnis' affidavit was signed on April 12, 1988, Fanguy's 2½ months later. The contemporaneous record supports McInnis' version better than it does Fanguy's, to the extent that one can wring a factual conflict out of them. But in fact there is no material conflict, as the district court and Fifth Circuit both found. *See* Carriere v. Sears, Roebuck and Co., 893 F.2d 98, 101 (5th Cir. 1990).

There is, moreover, nothing in all this to suggest an awareness of such circumstances on Officer McInnis' part that he could be said to have been "substantially certain" that Mr. Carriere would be shot and killed. And that, it must be remembered, is what Louisiana law on intentional acts in the workplace requires. The *obligation* at which plaintiff seem to be aiming won't do unless there is proof as well of the defendant co-employee's knowledge, to a substantial certainty, that harm of the type that actually befalls the plaintiff or the plaintiff's decedent will ensue. Officer Fanguy's affidavit, read as liberally as plaintiffs desire, doesn't reach that far.

Plaintiffs rely on *Willie* in seeking to salvage their claim against Sizeler Realty/Management. Plaintiff there had been abducted from the parking lot of a shopping center in Hammond, Louisiana, and was shot and injured; her companion, also abducted, was shot and killed. The young couple had gotten a late start and had missed the movie they had planned to attend. They were not in the parking lot to patronize one of the center's businesses, but the court rejected the contention that that fact relieved the center operator from all responsibility to provide reasonably for their safety, noting that the status—whether business invitee or trespasser—of an individual on another's property does not, under Louisiana law, determine the duty owed that person by the property owner. 547 So. 2d at 1084-85.

There is nothing surprising about that, but nothing pertinent either. *Willie* says nothing whatever about a property owner's duty to provide reasonably for the security of persons on neighboring premises. Sears, it must be remembered, owned and secured its retail store and the ground surrounding it. Sizeler Management, the center operator, had access but no responsibility.

CONCLUSION

There is, under this Court's Rule 10, no reason to grant the writ of certiorari plaintiffs seek. The petition identifies neither a conflict between the Fifth Circuit's decision and that of any other court of appeals or of this Court nor an important question of federal law that needs settling by this Court. The decisions below were rendered promptly, efficiently, and entirely in accordance with justice. The petition should be denied.

Respectfully submitted,

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